NO. 73-1071

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

LORCH-WESTWAY CORPORATION, *et al.*,
Appellants,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS–
FORT SMITH DIVISION

BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM

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Appellees' Motion to Dismiss and Affirm (Motion) buttresses Appellants' Jurisdictional Statements and gives added justification to this Court's taking jurisdiction. Appellees' argument shows clearly, as Appellants have demonstrated, that this is not a case where this Court will be required to review the substantiality of the evidence in the record below.

Court's Mechanical Verbatim Adoption of Appellees' Proposed Findings

Appellees' three "examples" of "other comments and quotations not included in Appellees' proposals" (Motion, p. 18, fn. 32) are, in fact, the only changes made by the Three Judge District Court. Except for these three insubstantial alterations, that Court's decision totally mirrors the proposed findings and conclusions of Appellees.[1] The appended table demonstrates this fact.

Appellees attempt to rationalize verbatim adoption as a practice which has recently been countenanced by several Courts of Appeals (Motion, p. 21, fn. 38). All but one of the decisions cited by Appellees involve patent cases which concern highly technical issues requiring expertise not possessed by those Courts. The other decision involves a complex bankruptcy case in which the Court explicitly disapproved the practice of verbatim adoption except where the subject matter is of a highly technical nature. *Flora Mir Candy Corporation v. R.S. Dickson & Co.*, 432 F.2d 1060, 1062, fn. 2 (2d Cir. 1970). Just as this qualification does not apply to antitrust cases, *United States v. El Paso Natural Gas*, 376 U.S. 651, 657, it does not apply to interstate commerce cases. As to ordinary cases, the practice is strongly condemned, especially where the extent of the uncritical adoption is as significant as here. See, *e.g.*, *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57; *Industrial Building Materials, Inc. v.*

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[1] Appendix A to the Court's Opinion, "Status of Jones Truck Lines, Inc." (Jt. App. J, pp. 789-794), concerns a matter disposed of by the Court on motion and involves a tangential matter related in no manner whatsoever to the merits of the case. Why the appendix was included is not clear on the face of the document.

Interchemical Corp., 437 F.2d 1336, 1340 (9th Cir. 1971); *In Re Las Colinas, Inc.*, 426 F.2d 1005, 1010 (1st Cir. 1970); *Featherstone v. Barash*, 345 F.2d 246, 249 (10th Cir. 1965); *Roberts v. Ross*, 344 F.2d 747, 752 (3d Cir. 1965); *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 738 (5th Cir. 1962); *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724 (4th Cir. 1961), *cert. denied*, 368 U.S. 825; *United States v. Forness*, 142 F.2d 928, 942 (2d Cir. 1942), *cert. denied*, 316 U.S. 694; see Nordbye, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 25, 30 (1940); Otis, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 83, 85 (1940).

Precedent for Reversal

Appellees contend that the degree of judicial abdication by the Three Judge District Court[2] is defensible because there is no precedent for reversal on this ground. This contention is manifestly erroneous. *In Re Las Colinas, Inc.*, 426 F.2d 1005, 1017 (1st Cir. 1970);

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[2] Appellees attempt to cast this issue as one involving the integrity of the three judges on the panel. (Motion, pp. 13, 21). Appellants do not challenge integrity, only abdication. The danger inherent in relinquishing judicial duties to advocates is well-stated in *Brenger v. Brenger*, 142 Wis. 26, 125 N.W. 109 (1910), quoted in Otis, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F.R.D. 83, 85 (1940):

> "Experience shows that counsel, the most able, honorable and conscientious ... after the close of a hotly contested case, are not in the frame of mind, ordinarily best suited to drafting the findings, which must express the judgement of the court.... The making of the findings is a purely judicial function."

This statement also is quoted in *In Re Las Colinas*, 426 F.2d 1005, 1009 n. 4 (1st Cir. 1970).

Industrial Building Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1345 (9th Cir. 1971); *Featherstone v. Barash*, 345 F.2d 246, 251 (10th Cir. 1965); *Roberts v. Ross*, 344 F.2d 747, 753 (3d Cir. 1965); *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719 724 (4th Cir. 1961), *cert. denied*, 368 U.S. 825. In each of these cases, findings prepared by counsel and adopted by the Court were deemed inadequate to support the judgment, and the judgment was reversed or vacated on appeal.

Respectfully submitted,

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APPENDIX A

Appellees' Proposed Findings of Fact (App. I) Para. No.	Page	District Court Opinion (App. J) Page	Comparison
6	699	744	Adopted verbatim
7	699-700	744-45	"
8	700	745	"
9	700-1	745-46	"
10	701	746	"
11	701	746	"
12	701	746	"
13	702	747	"
14	702	747	"
15	702	747	"
16	702-3	748	"
17	703	748-9	"
18	704	749	"
19	704-5	749-50	"
20	705	751	"
21	705-6	751-52	"
22	707	752-53	"
23	707	753	"
24	708-9	753-55	"
25	709	755	"
26	709	755	"
27	709	756	"
28	710	756	"
29	710	756-57	"
30	710	757	"
31	710	757	"
32	710	757-58	"
33	711	758	"
34	711-12	758	"

Appellees' Proposed Findings of Fact (App. I) Para. No.	Page	District Court Opinion (App. J) Page	Comparison
35	712	758-59	adopted verbatim
36	712-13	759	"
37	713	759-60	"
38	713-14	760-61	"
39	714	761	"
40	714-15	761-62	"
41	715-16	762-63	"
42	716-17	763-64	"
43	717	764-65	"
44	717-18	765	"
45	718	765-66	"
46	718-19	766-67	"
47	719-20	767	"
48	720	767-68	"
49	720	768	"
50	720-21	768	"
51	721	769	"
52	721	769	"
53	721	769	"
54	721	769	"
55	721-22	769-70	"
56	722	770-71	"

Appellees' Proposed Conclusions of Law (App. I) Para. No.	Page	District Court Opinion (App. J) Para. No.	Page	Comparison
1	724	1	771	Adopted Verbatim
2	724	2	771-72	"
3	725	3	772-73	"
4	725-26	4	773-74	Quote added from *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156.
5	726	5	774	Adopted Verbatim
6	726-27	6	775	"
7	727	7	775-76	"
8	727	8	776	Quote added from *Universal Camera Corp. v. NLRB*, 340 U.S. 474; added citation to *Bituminous Material & Supply Co. v. NLRB*, 281 F.2d 363 (8th Cir. 1960).
9	727-28	9	776-77	Adopted Verbatim
10	728	10	777	"
11	728	11	777-78	"
12	728-29	12	778	"
13	729	13	778-79	"
14	730	14	779	"
15	730-31	15	779-80	"
16	731	16	780	"
17	731	17	781	"
18	732	18	781	"
19	732	19	781	"
20	732	20	781-82	"

Appellees' Proposed Conclusions of Law (App. I)		District Court Opinion (App. J)		Comparison
Para. No.	Page	Para. No.	Page	
21	732-34	21	782-84	adopted verbatim
22	734	22	784	"
23	734-35	23	784-85	"
24	735	24	785	"
25	735-36	25	785-86	"
26	736	26	786	"
27	736-37	27	786-87	"
28	737	28	787	"
29	738	29	787-88	Ordering clause only changed.